Supreme Court, U.S.
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No. 06-59

IN THE

Supreme Court of the United States

BRENTLEY COATES,

Petitioner,

v.

AGILENT TECHNOLOGIES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

I. Petitioner alleged that ERISA plan fiduciaries were obliged to disregard an express provision, found in the terms of the plan, to terminate one of two investment options. He conceded, however, that the investments made under the remaining option were not imprudent. Did the courts below correctly hold, in the particular circumstances of this case, that the plan fiduciaries breached no duty by adhering to the terms of the plan?

II. Respondents never challenged petitioner's standing to maintain this action, and the courts below proceeded to resolve his claim on the merits. Nevertheless, petitioner asks this Court to issue an advisory opinion on whether a "subset" of plan participants has standing to sue under ERISA § 502(a)(2). Should this Court decline to do so on the ground that the issue is not properly presented?

RULE 29.6 STATEMENT

Agilent Technologies, Inc., and Hewlett-Packard Company are corporate entities that have issued shares to the public. No parent or publicly held company owns 10% or more of stock of Agilent Technologies, Inc., or of the Hewlett-Packard Company. The Agilent Technologies, Inc. Deferred Profit-Sharing Plan and the Hewlett-Packard Company Deferred Profit-Sharing Plan are not corporate parties, but instead are pension benefit plans recognized as separate legal entities under 29 U.S.C. § 1132(d)(1).

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Agilent Technologies, Inc., the Agilent Technologies, Inc. Deferred Profit-Sharing Plan, Hewlett-Packard Company, and the Hewlett-Packard Company Deferred Profit Sharing Plan respectfully submit that the petition for a writ of certiorari should be denied.

STATEMENT

After the two corporate respondents amended their respective profit sharing plans to eliminate an investment option, petitioner sued for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* A plan sponsor's decision to eliminate an investment option through a plan amendment is a "settlor" function that is not subject to fiduciary review. Thus, petitioner's sole claim was that the plan fiduciaries were obligated to disregard the directive contained in the plans to terminate one particular investment option. But because petitioner conceded below that the remaining investment option was not imprudent, the district court held that the fiduciaries acted consistently with their ERISA duties by adhering to the plan terms. The court of appeals affirmed.

1. Petitioner is a former employee of Hewlett-Packard Company ("HP") and a former participant in the Hewlett-Packard Deferred Profit-Sharing Plan (the "HP Plan"), a pension plan governed by ERISA. Pet. App. 9a. Petitioner became an employee of Agilent Technologies, Inc. ("Agilent") and a participant in the Agilent Technologies, Inc. Profit-Sharing Plan (the "Agilent Plan") when Agilent was spun off from HP on June 2, 2000. *Ibid.*

Before 2000, the HP Plan included two investment options, "Fund A" and "Fund B." Pet. App. 9a–10a. Fund A was invested in both equity and debt securities; Fund B was exclusively invested in bonds. *Id.* at 10a. In October 1999,

petitioner chose to invest 100% of his account balance in Fund B. C.A. App. 48; Pet. App. 10a.

Effective May 1, 2000, HP amended the HP Plan to provide for the elimination of Fund B as of June 1, 2000. Pet. App. 10a. Pursuant to the terms of the amended HP Plan, on June 1, 2000, the assets held in Fund B were transferred to Fund A. *Ibid.* Thereafter, the HP Plan (and, after the spin-off, the Agilent Plan) offered only one investment option, Fund A, a diversified fund that included both equity and debt securities. *Ibid.* Notably, both immediately before and after June 1, 2000, petitioner's account balance remained the same.

2. Petitioner sued HP and Agilent in their capacities as plan sponsors and "named fiduciaries" of the HP Plan and Agilent Plan, respectively, contending that the adoption and implementation of the plan amendments eliminating Fund B as an investment option constituted a breach of fiduciary duty under ERISA. Petitioner brought suit under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), which authorizes plan participants to bring a civil action "for appropriate relief" under ERISA § 409, 29 U.S.C. § 1109, which in turn provides that plan fiduciaries "shall be personally liable to make good to [the] plan any losses to the plan resulting from" the breach of any duty imposed by ERISA, including the "prudent man" standard applicable to fiduciaries under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).[1]

a. Petitioner's original complaint alleged that HP and Agilent "were acting in their fiduciary capacities" when they decided to amend the plans to eliminate Fund B as an investment option. C.A. App. 7. Agilent moved to dismiss the

[1] Petitioner also named the plans as nominal defendants. It is well-established, however, that suits for breach of fiduciary duty under ERISA may only be asserted against a fiduciary, and neither the HP Plan nor the Agilent Plan is a fiduciary under ERISA. 29 U.S.C. § 1109(a); *see, e.g.*, *Gelardi* v. *Pertec Computer Corp.*, 761 F.2d 1323, 1324 (9th Cir. 1985).

original complaint on the ground that the decision to amend the Agilent Plan to eliminate the Fund B investment option was a plan sponsor, or "settlor," function, and was not undertaken in its capacity as a plan fiduciary. The district court agreed that "employers or other plan sponsors are free under ERISA, for any reason at any time, to adopt, modify, or terminate the terms of a pension benefit plan." Pet. App. 19a (citing *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 890–91 (1996), and *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 443–44 (1999)). The court concluded that "because Agilent was not acting as a fiduciary but as a plan 'settlor' in designing the terms of the Agilent [Plan], plaintiff's claim [for breach of fiduciary duty] must fail." *Id.* at 20a.

Petitioner tried to avoid dismissal by "characteriz[ing] his cause of action as being aimed solely at the [plan fiduciaries'] failure to disobey and override the express terms of the benefit plans at issue." Pet. App. 20a. The district court held that the allegations of the original complaint were insufficient to support such a claim:

> There is nothing inherent in the decision to eliminate Fund B that would require Agilent to breach its duty to the plan beneficiaries. If Agilent's ultimate investment decisions are prudent then it is irrelevant whether those investments are characterized as "Fund B" or as "Fund A." Plaintiff might have a claim against Agilent if, for instance, [he] alleged that Agilent acted imprudently in how it liquidated Fund B or in how it re-invested the Fund B assets into other investments, but plaintiff's complaint, as it now stands, does not contain such allegations. As such, even if plaintiff's theory is valid, his complaint fails to state a claim.

Id. at 22a.

b. Petitioner filed an amended complaint in which he attempted to allege that it was imprudent for the plan fiduciar-

ies to implement the plan sponsors' directive found in the plan amendments to terminate Fund B and transfer the plans' investments in Fund B to Fund A. C.A. App. 51. The district court concluded that the new allegations were insufficient for the simple reason that petitioner did not, and could not, allege that the investment of the plans' assets in the remaining investment option—Fund A—was imprudent:

> [P]laintiff does not allege that the asset composition of Fund A[,] in itself, violates the prudent man standard. It appears that plaintiff's true gripe is that assets in Fund A were not invested in accordance with the subjective desires of Fund B participants. . . . However, plaintiff cites no authority to show the plan administrator had a fiduciary duty to reallocate fund assets to satisfy the expectations of a particular group of participants.

Pet. App. 13a–14a. The court concluded that petitioner's "inability to allege that the overall composition of Fund A was imprudent is ultimately fatal to his case." *Id.* at 15a.

3. In a brief, unpublished decision, the Ninth Circuit affirmed the dismissal of petitioner's first amended complaint. The court first held that the plan sponsors' decision to merge Fund B into Fund A "does not implicate the employer's fiduciary duties." Pet. App. 4a (quoting *Hughes Aircraft Co.*, 525 U.S. at 444). The court then rejected petitioner's claim that the plan fiduciaries had an obligation to disregard the plans' express directive to terminate Fund B and merge its assets with those in Fund A:

> Defendants did not breach their fiduciary duties when they followed the express terms of the plan and merged the two funds. *See Wright* v. *Oregon Metallurgical Corp.*, 360 F.3d 1090, 1093 (9th Cir. 2004). Defendants' duties ran to the plan as a whole, not to any subset of beneficiaries, because fiduciaries are required "to take impartial account of the interests of all beneficiaries." *Varity Corp.* v.

> *Howe*, 516 U.S. 489, 514 (1996); *see* 29 C.F.R. § 2550.404a-1 (describing fiduciary's duties in reference to the plan as a whole). Plaintiff concedes that the merged fund was properly invested in a diversified investment portfolio, so he failed to state a claim for breach of fiduciary duty.

Ibid.

REASONS FOR DENYING THE PETITION

The fact-bound decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, the petition for a writ of certiorari should be denied.

I. A Plan Fiduciary Violates No Duty By Following A Plan Sponsor's Directive Contained In The Terms Of A Plan That Is Not Imprudent

"Petitioner did not dispute [in the Ninth Circuit]"—and does not dispute in this Court—"that plan sponsor activities are *not* subject to ERISA's fiduciary standards." Pet. 13 (emphasis added). Nor does petitioner dispute that HP's and Agilent's decisions to amend the plans by eliminating the Fund B investment option was a non-fiduciary "plan sponsor activity." *See Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 444 (1999) (holding that an employer's decision to amend a pension plan does not implicate fiduciary duties); *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 890 (1996) (same). As this Court has explained, "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate [ERISA] plans." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995). Thus, HP's and Agilent's decisions, as plan sponsors, to terminate the Fund B investment option are not actionable as breaches of a fiduciary duty under ERISA.

Unable to challenge the plan sponsors' decisions to eliminate the Fund B investment option, petitioner's sole

claim is that HP and Agilent, as plan fiduciaries, were obligated to disregard the plan sponsors' express directive as contained in the terms of the plans. *See* Pet. 2 ("[Petitioner] alleged that the Plan's fiduciaries should have declined to follow the plan sponsor's amendment of the plan instrument because it required them to breach their fiduciary duties to him and [other] participants who had invested their retirement assets in [Fund B]"). As the district court recognized, petitioner's "true gripe" is "that assets in Fund A were not invested in accordance with the subjective desires of Fund B participants." Pet. App. 13a. But petitioner's mere assertion that he would have preferred to remain invested in Fund B is insufficient to state a claim under ERISA against the fiduciaries for adhering to the plan amendment.

Contrary to petitioner's unsupported assertion, the Ninth Circuit did not "hold that a fiduciary is exempt from ERISA's fiduciary provisions when following the dictates of plan terms." Pet. 16. Rather, the Ninth Circuit adhered to the settled rule that a plan fiduciary's "decision to comply with the *lawful* terms of [a] Plan" is "entirely consistent with ERISA's fiduciary requirements." *Wright* v. *Oregon Metallurgical Corp.*, 360 F.3d 1090, 1093 (9th Cir. 2004). This rule applied in the particular circumstances of this case, the Ninth Circuit ruled, because petitioner *conceded* that the investment of the plans' assets in the remaining Fund A was not imprudent. Pet. App. 4a ("[Petitioner] concedes that the merged fund was properly invested in a diversified investment portfolio, so he failed to state a claim for breach of fiduciary duty").

ERISA requires that fiduciaries discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]." ERISA § 404(a), 29 U.S.C. § 1104(a)(1)(D). The plan fiduciaries were therefore required to adhere to the plan amendment, and terminate Fund B, if that amendment was consistent with ERISA. And

petitioner failed to allege any facts that could give rise to a colorable claim that the amendment was *not* consistent with ERISA. To the contrary, petitioner's "inability to allege that the overall composition of Fund A was imprudent is ultimately fatal to his case." Pet. App. 15a. That is because where, as here, the assets of a plan are invested prudently, the plan fiduciary has fulfilled the investment duties imposed by ERISA. Rules & Regulations for Fiduciary Responsibility; Investment of Plan Assets Under the "Prudence" Rule, 44 Fed. Reg. 37,221, 37,222 (June 26, 1979) (codified at 29 C.F.R. Part 2550); 29 C.F.R. § 2550.404a-1..

Because petitioner conceded that the assets held within Fund A were prudently invested, the court of appeals had no occasion to, and did not, reach the question of a fiduciary's obligation to disregard plan terms that are inconsistent with ERISA. That question (*i.e.*, the second question presented in the petition) is therefore not properly presented for this Court's review. *See McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) ("[I]t is . . . the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases . . . that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below") (citation omitted); *see also, e.g.*, *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991).

Nor is there any reason for the Court to consider the contours of a fiduciary's duty to disregard plan terms in the context of this case. Such a duty may exist in *some* circumstances. *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 568 (1985) ("trust documents cannot excuse trustees from their duties under ERISA"); *see also Pegram* v. *Herdrich*, 530 U.S. 211, 227 n.7 (2000). Petitioner cites several cases in which the courts of appeals have examined that duty in the context of employee stock ownership plans ("ESOPs"). Pet. 14–15 (citing *Eaves* v. *Penn*, 587 F.2d 453 (10th Cir. 1978); *Moench* v. *Robertson*, 62 F.3d 553 (3d Cir. 1995); and *Kuper* v. *Io-*

venko, 66 F.3d 1447 (6th Cir. 1995)). Although the Ninth Circuit expressed some doubt about the correctness of the *Moench* standard in *Wright*, it did not resolve the issue because it concluded that the "[p]laintiffs' prudence claim is unavailing under any existing approach." 360 F.3d at 1098. Petitioner's claim likewise fails under any standard articulated by any court to date, because he has conceded that the ultimate investment decision was not imprudent. Accordingly, this case is not an appropriate vehicle for this Court to consider the proper standard, because the outcome would be the same regardless.

Petitioner maintains, however, that "the Secretary [of Labor] has taken a position contrary to that of the Ninth Circuit on this issue." Pet. 16. Petitioner cites two *amicus* briefs filed by the Department of Labor that take the position that "fiduciaries have a duty under section 404(a)(1)(D) to decline to follow the terms of the plan document where those terms require them to act imprudently in violation of ERISA section 404(a)(1)(B)." DOL *Agway* Br. (http://www.dol.gov/sol/media/briefs/agway(A)-6-18-2004.pdf), at 9; *see also* DOL *Tatum* Br. (http://www.dol.gov/sol/media/briefs/tatum(A)-5-7-2004.pdf), at 13. Assuming *arguendo* that the Secretary has correctly stated the law, a fiduciary has the duty (and, indeed, the authority) to disregard an express plan provision *only if* following the plan would be imprudent. But because petitioner in this case has *conceded* that the investment of plan assets in the remaining Fund A was *not* imprudent, the plan fiduciaries necessarily had no duty (or authority) to disregard the express plan terms requiring them to terminate the alternative investment option, Fund B, and merge its assets into Fund A. There is thus no inconsistency between the decision below and the positions advanced by the Secretary in other cases.

Petitioner's concession regarding the prudence of Fund A gives the lie to his bald assertion that "[t]he Ninth Circuit's decision . . . shields ERISA fiduciaries from the need to exercise any and all responsibility under section 404 simply be-

cause the plan sponsor issued an instruction." Pet. 3–4. What the Ninth Circuit *actually* held is that where the plan sponsor's instruction as expressed in the terms of the plan is not imprudent, the plan fiduciary breaches no duty by following that instruction. That is precisely what the statute says. 29 U.S.C. § 1104(a)(1)(D) (fiduciary shall discharge obligations "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA]"). The Ninth Circuit's decision is thus entirely consistent with the statute, and does not conflict with any judicial decision (or, for that matter, the Labor Department's litigating position). Review by this Court is not warranted.

II. The Contours Of ERISA Standing Are Not At Issue In This Case

A claim under ERISA § 502(a)(2) is brought on behalf of the plan, allowing a plan participant to seek relief that will redound to the plan itself. Accordingly, this Court has held that a plan participant seeking only *individual* relief does not have standing to sue under section 502(a)(2). *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134 (1985). Petitioner maintains that this case presents a question not directly resolved by *Russell*—*viz.*, whether a plan participant has standing to sue under ERISA § 502 on behalf of *some* but not *all* participants. *See* Pet. 9, 11. Petitioner is wrong.

Respondents did not challenge petitioner's standing in the lower courts, and neither the district court nor the court of appeals even considered the standing issue, let alone concluded that petitioner lacked standing. Rather, they proceeded to resolve petitioner's claim *on the merits*. *See* C.A. App. 88 (district court judgment dismissing the action "with prejudice"). Because standing was neither presented to nor

decided by the courts below, it is not properly before this Court. *See, e.g.*, *McGoldrick*, 309 U.S. at 434.[2]

Petitioner's argument to the contrary is based on a misreading of a single sentence of the Ninth Circuit's brief decision. According to petitioner, the Ninth Circuit held that he "cannot assert a claim under Section 502(a)(2) on behalf of the plan because the alleged fiduciary violations affected only Petitioner's subclass of participants." Pet. 11. But that is *not* what the Ninth Circuit held. Rather, the Ninth Circuit held, in the course of rejecting petitioner's claim on the merits, that in determining whether a fiduciary has a duty to disregard the express terms of the plan, the fiduciary must consider the "plan as a whole" rather than "any subset of beneficiaries." Pet. App. 4a (citing *Varity Corp.* v. *Howe*, 516 U.S. 489, 514 (1996), and 29 C.F.R. § 2550.404a-1). Petitioner contends that "[a]lthough the Ninth Circuit cited to this Court's decision in *Varity* . . ., the 'plan as a whole' language that provided the foundation for its reasoning originates from [*Russell*]." Pet. 9. But as petitioner recognized in the court below, "the language in *Varity* and that of *Russell* speak of two separate issues: *Varity* speaks to the scope of a fiduciary's duty, whereas *Russell* deals with standing to sue under 502(a)(2)." C.A. Pet. Reh'g 13. The Ninth Circuit consid-

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[2] Although *constitutional* standing may be raised at any time, including in this Court (*see Juidice* v. *Vail*, 430 U.S. 327 (1977)), *statutory* standing need not be resolved where, as here, there are other grounds for disposing of an ERISA plaintiff's claim on a motion to dismiss. *See Coan* v. *Kaufman*, No. 04-5173-cv, 2006 U.S. App. LEXIS 18444, at *13 (2d Cir. July 21, 2006) (citing *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998)). If petitioner has standing to sue, then his concession regarding the prudence of Plan A requires affirmance of the existing judgment of dismissal. If he lacks standing to sue, then his lawsuit must also be dismissed. Because resolution of the standing issue raised by petitioner will have no effect on the ultimate outcome of this litigation, he is effectively asking this Court to render a purely advisory opinion on that issue.

ered *only* the former, *not* petitioner's standing to maintain this action.

On the fiduciary duty issue that the Ninth Circuit actually decided, the courts are unanimous. As the Ninth Circuit recognized, fiduciary duties run to the plan and its participants and beneficiaries generally, requiring a fiduciary "to take impartial account of the interests of all beneficiaries." *Varity Corp.*, 516 U.S. at 514. Indeed, the Prudence Regulation requires that a fiduciary determine "that the particular investment or investment course of action is reasonably designed . . . to further the purposes *of the plan*"—not some subset of plan participants. 29 C.F.R. § 2550.404a-1(b)(2)(i) (emphasis added). ERISA does not require a fiduciary to invest plan assets so as to benefit any one group of participants over any other. 29 U.S.C. § 1104(a)(1); *see also Johnson* v. *Georgia-Pac. Corp.*, 19 F.3d 1184 (7th Cir. 1994); *Foltz* v. *U.S. News & World Report, Inc.*, 865 F.2d 364, 374 (D.C. Cir. 1989). So long as the fiduciary is attentive to the interests of the participants in the aggregate, the fact that individual participants might have benefited more from a different resolution cannot serve as the basis for a claim of breach of duty. The courts below correctly recognized that petitioner's theory, which would require a fiduciary to assess the subjective interests and desires of each plan participant before following the plan's terms, is not only inconsistent with ERISA but also unsupported by *any* authority. Pet. App. 4a, 14a.

Petitioner contends, however, that the Ninth Circuit has "squarely reject[ed] the position of the Sixth and Third Circuits." Pet. 11. Unfortunately for petitioner, the decisions he cited have nothing whatsoever to do with this case. As discussed above, petitioner's standing was never an issue. "In [*Kuper*], the Sixth Circuit held that a subset of employee benefit participants has *standing* to bring an action for breach of fiduciary duty under 29 U.S.C. § 1109." *In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 239 (3d Cir. 2005) (emphasis added); *see Kuper*, 66 F.3d at 1452–53. The Ninth Circuit neither accepted nor "reject[ed]" *Kuper* (or *Schering-*

Plough); to the contrary, the standing issue simply was not presented to the court for decision, and consequently was not decided.[3] Instead, the court proceeded to resolve petitioner's claim on the merits.

Petitioner also maintains that "[t]he Secretary of Labor . . . has described Petitioner's [first] Question Presented as 'an important and recurring issue.'" Pet. 11. The issue that the Secretary has so described, however, is "[w]hether participants in individual account pension plans have *standing to sue* plan fiduciaries under section 502(a)(2) of [ERISA] for relief to the plan when the alleged violations affected some, but not all, of the plan participants' accounts." DOL *Milofsky* Br. (http://www.dol.gov/sol/media/briefs/milofsky(A)-2-27-2004.pdf), at 1 (emphasis added); *see also* DOL Supp. *Milofsky* Br. (http://www.dol.gov/sol/media/briefs/milofsky(A)-08-11-05.pdf), at 1 (same); DOL *Schering-Plough* Br. (http://www.dol.gov/sol/media/briefs/Schering(A)-10-20-2004.pdf), at 1 (similar). In this case, there is no question of petitioner's *standing to sue* the plan fiduciaries. Thus, regardless of the issue's importance, and whether or not it may recur, this case does not present an appropriate vehicle even to consider the issue, much less resolve it.

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[3] Indeed, petitioner cited *Kuper* in the Ninth Circuit merits brief only for an unrelated proposition. *See* Pet. C.A. Br. 18–19.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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